2013 IL App (2d) 120247-U
No. 2-12-0247
Order filed August 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-128
LUIS P. LOPEZ,	)	Honorable Fernando L. Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was properly convicted of both burglary and retail theft: under the applicable abstract-elements test, burglary is not a lesser included offense of retail theft.

¶ 2 Defendant, Luis P. Lopez, was charged with burglary (720 ILCS 5/19-1(a) (West 2010)) and retail theft (720 ILCS 5/16A-3(a) (West 2010)). The burglary charge alleged that defendant entered a Wal-Mart in Belvidere with the intent to commit retail theft, an unauthorized act, within. The retail theft charge was based on the commission of the same unauthorized act. After a bench trial on

stipulated evidence, the trial court found defendant guilty of both charges, denied his posttrial motion, and sentenced him to concurrent prison terms of 10 years for burglary and 5 years for retail theft.[1] Defendant appeals his conviction of burglary, contending that it must be vacated because it is a lesser included offense of retail theft and because the State abused its discretion in charging him with both offenses. We affirm.

¶ 3 The evidence included stipulations to what five potential witnesses would say were they to testify. These witnesses were Courtney Waterman, an employee of the Belvidere Wal-Mart; Erin Diskin, an assistant manager; and Julie Kirk, Patrick Gardner, and Matthew Shook, three Belvidere police officers. The trial court also admitted several exhibits. We summarize the evidence.

¶ 4 On the afternoon of April 26, 2011, Waterman was at work. Previously, she had learned that three people, later identified as Amber Dempsey, Stephanie Summers, and defendant, were suspects in thefts from another Wal-Mart. Between 5 and 5:20 p.m., Waterman saw Summers looking at computers in the electronics department. Summers did not buy anything. She left through the "tire and lube express exit" and entered a Dodge Charger. Shortly afterward, Waterman saw Dempsey in the electronics department. Dempsey placed a Hewlett Packard (HP) computer into her cart; two floor mats were already there. At about 5:24 p.m., Dempsey went to the tire and lube express checkout, paid cash for the items, obtained a receipt, and left the store.

¶ 5 Waterman returned to the electronics area and saw defendant enter, pushing a shopping cart with two floor mats in it. He placed an HP computer into the cart. He went to a check-out aisle and

---

[1]For sentencing purposes, the burglary conviction, ordinarily a Class 2 offense (see 720 ILCS 5/19-1(b) (West 2010)), was treated as a Class X offense, owing to defendant's prior convictions. See 730 ILCS 5/5-5-3(c)(2)(F) (West 2010).

purchased some snacks. Defendant paid cash for the snacks, showed the cashier a receipt, and did not pay for the computer or the floor mats. As Waterman followed him, defendant showed a greeter the receipt, which the greeter marked. He passed a sandwich shop where Diskin and another assistant manager were watching him. The three employees confronted defendant and took him to an office. Defendant spoke to them briefly, then ran out, leaving the shopping cart behind. He exited the building and ran toward the Dodge Charger. Diskin and Waterman separately called the police.

¶ 6 At about 5:45 p.m., Kirk, Shook, Gardner, and another officer stopped the Dodge Charger. Dempsey was driving; Summers and defendant were passengers. A consensual search of the trunk revealed an HP computer and two floor mats. Before handing defendant his coat, Shook removed a receipt that showed a purchase of snacks at 5:36 p.m. Dempsey handed the officers another receipt, which showed the purchase of two floor mats and an HP computer at 5:24 p.m.

¶ 7 Shook went to the store. Waterman took the items that defendant had abandoned to a cash register, rang them up, and showed Shook the "training receipt," which showed that the computer's serial number was different from that of the computer found in the Dodge Charger. Shook drove Waterman to the area of the stop, where Waterman positively identified defendant and his two female associates. The three suspects were arrested. Shook drove Waterman back to the store. Later, defendant confessed to the theft.

¶ 8 The trial court found defendant guilty of burglary and retail theft.[2] On the former charge, the court explained that, as the State had argued, defendant's entry into the Wal-Mart had been "without

[2]The court also found defendant not guilty of aggravated battery (720 ILCS 5/12-3.05(a) (West 2010)), a charge based on the allegation that he pushed Diskin as he ran out of the office.

authority" (720 ILCS 5/19-1(a) (West 2010)) because, when he entered, he had intended to commit retail theft. Defendant had argued that the burglary was a lesser included offense of the retail theft because the acts that constituted the burglary were actually attempted retail theft (see 720 ILCS 5/8-4(a) (West 2010)). The court disagreed, reasoning that, under the "abstract elements test" (see *People v. Miller*, 238 Ill. 2d 161,173 (2010)), the burglary could not be a lesser included offense of the theft, because each offense included elements not present in the other. After the court denied defendant's posttrial motion and sentenced him, defendant appealed only the conviction of burglary.

¶ 9 On appeal, defendant advances several closely interrelated arguments why his conviction of burglary cannot stand. All involve the application of the law to undisputed facts, and therefore are reviewed *de novo*. See *Wills v. Foster*, 229 Ill. 2d 393, 399 (2008).

¶ 10 Defendant contends first that the burglary conviction must be vacated because it was tantamount to a conviction of attempted retail theft, which is a lesser included offense of retail theft. Defendant acknowledges that, in *Miller*, the supreme court held that retail theft is not a lesser included offense of burglary, even when the entry is unauthorized because it is made with the intent to commit retail theft. *Miller*, 238 Ill. 2d at 173. However, he contends that, because his entry into the Wal-Mart, with the intent to commit retail theft, amounted to attempted retail theft, a lesser included offense of retail theft, it cannot support the conviction of burglary. We disagree.

¶ 11 In *Miller*, the defendant entered a Walgreens during regular business hours and committed a retail theft. He was charged with both burglary and retail theft, the former being based on his entry with the intent to commit the latter. He was convicted of both charges. Before the supreme court, he argued that the retail theft conviction could not stand, because it was of a lesser included offense of the burglary. The court disagreed. The court started with the established principle that, under the

one-act, one-crime doctrine (see *People v. King*, 66 Ill. 2d 551, 566 (1977)), multiple convictions based on more than one act are improper if, but only if, any of the offenses are lesser included offenses. *Miller*, 238 Ill. 2d at 165.

¶ 12 The court held that, to decide whether one charged offense is a lesser included offense of another charged offense, a court must employ the "abstract elements approach." *Id.* at 166. "If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Id.* Thus, contrary to the defendant's contention, retail theft was not a lesser included offense of burglary: retail theft required (1) a taking and (2) the failure to pay for the merchandise, neither of which were elements of burglary, and the two offenses' requisite criminal intents were different. *Id.* at 176. Therefore, because it was possible to commit retail theft without committing burglary, retail theft was not a lesser included offense of burglary. *Id.*

¶ 13 Notably, the court reasoned that to hold that retail theft was a lesser included offense of burglary would thwart the legislature's intent to hold defendants accountable "for the full measure of their conduct and harm caused." *Id.* at 173. The court explained:

> "[T]he legislature has enacted two separate offenses, burglary and theft. Had the legislature intended that a defendant could only be convicted of one of them where they are based on conduct that occurred during the same criminal transaction, it clearly could have done so. It did not." *Id.*

¶ 14 *Miller* defeats any contention that defendant could not properly be convicted of both burglary and retail theft. The only possible distinction between *Miller* and this case is that in *Miller* the defendant contended that retail theft was a lesser included offense of burglary, whereas here

defendant contends that burglary is a lesser included offense of retail theft. However, under the "abstract elements test," burglary is no more a lesser included offense of retail theft than the other way around. Burglary requires proof of unlawful entry, which is not an element of retail theft. It is possible to commit retail theft without committing burglary; a person might enter without intending to commit a retail theft, but then change his mind and steal something. Whether that commonly happens, and whether it happened here, are legally irrelevant. The abstract elements test does not make one charged offense a lesser included offense of another charged offense unless it is "*impossible* to commit the greater offense without necessarily committing the lesser offense." (Emphasis added.) *Id.* at 166. And, as its name implies, the application of the test does not turn on the specific facts of the case or the evidence supporting either charge.

¶ 15 Defendant attempts to evade the unmistakable import of *Miller* by the following stratagem. He notes that attempted retail theft is a lesser included offense of retail theft. He then reasons that, because the burglary in this case was tantamount to attempted retail theft, it must be vacated under the one-act, one-crime rule. Defendant's argument is unsound; even granting his premise, the conclusion does not follow.

¶ 16 Defendant acknowledges that a conviction of attempted retail theft requires proof that, with the intent to commit retail theft, he performed an act that was a "substantial step toward the commission of [retail theft]." 720 ILCS 5/8-4(a) (West 2010). Defendant does not cite any pertinent legal authority for the proposition that his mere entry into the Wal-Mart amounted to a substantial step toward the commission of retail theft. As his attempt to distinguish *Miller* rests on this unsupported premise, we may consider his argument forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Holmstrom v. Kunis*, 221 Ill. App. 3d 317, 325 (1991). However, even disregarding

forfeiture, and even assuming that the acts on which defendant's burglary conviction are based would support a conviction of attempted retail theft, the argument still fails.

¶ 17 Defendant employs a faulty syllogism. Major premise: his conviction of burglary is based on the same facts that also prove attempted retail theft. Minor premise: attempted retail theft is a lesser included offense of retail theft. Conclusion: his conviction of burglary is of a lesser included offense of retail theft. However sound the premises, the conclusion does not follow. Under the abstract elements test, burglary is not a lesser included offense of retail theft, even if the facts on which a burglary conviction rests would support a different charge that *is* a lesser included offense.

¶ 18 Defendant's second argument is that convicting him of both charges would not serve the legislative intent behind the burglary statute. He asserts that the purpose of the burglary statute is to criminalize trespasses, such as the unlawful entry into an area of a store that is off-limits to the general shopping public. Defendant reasons that this purpose is not served here, as his entry was not a trespass and was unauthorized only because he intended to commit the retail theft, which is already a separate offense. Thus, defendant concludes, convicting him of burglary serves no purpose other than that already served by the retail theft statute.

¶ 19 Our supreme court has long held that a conviction of burglary may rest on a defendant's entry into a business establishment while it is open, with the intent to commit a theft therein, even if the defendant does not enter restricted spaces and is convicted of theft as well. See, *e.g.*, *Miller*, 238 Ill. 2d at 173; *People v. Blair*, 52 Ill. 2d 371, 374 (1972); *People v. Weaver*, 41 Ill. 2d 434, 439 (1968). Defendant's assertion that the legislature did not intend to punish a defendant both for retail theft and for burglary based on entry with the intent to commit retail theft cannot be squared with these opinions. Further, it ignores *Miller*'s statement that, had the legislature intended that a defendant

could be convicted of *only* burglary *or* theft in this type of situation, it clearly could have done so—but did not. *Miller*, 238 Ill. 2d at 173.

¶ 20 Defendant's characterization of the legislature's intent is unsupported by any actual *evidence* of that intent. Moreover, the available evidence contradicts his position. The legislature has never amended the burglary statute so as to disturb the supreme court's construction of it in the foregoing opinions. Therefore, we may presume that the legislature has acquiesced in the court's construction of its intent. See *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 404 (2005). Defendant's legislative-intent argument fails.

¶ 21 Defendant argues third, and finally, that the State abused its discretion in charging him with both burglary and retail theft. Substantively, this argument is indistinguishable from the previous one: defendant's premise is that "there is no indication that the legislature intended a shoplifter to be ultimately convicted of both retail theft and burglary when there is a single instance of shoplifting." As we noted, courts have repeatedly upheld convictions of both offenses in these circumstances, and there is no indication that the legislature did *not* intend such a result.

¶ 22 Defendant cites *People v. McDaniel*, 2012 IL App (5th) 100575, to support his reading of the legislature's intent. *McDaniel*, however, in no way suggests that a defendant may not be convicted of both retail theft and burglary based on entry for an unauthorized purpose. In *McDaniel*, the defendant was convicted of retail theft and burglary based on remaining in the store without authority (*i.e.*, he intended to commit retail theft). He was acquitted of burglary based on entering without authority (*i.e.*, entering during business hours with the intent to commit retail theft). The appellate court held that he had not been proved guilty beyond a reasonable doubt of burglary, because the evidence showed that, immediately after stealing merchandise, he exited the store. *Id.* ¶ 19. The

court explained that to affirm the conviction of burglary under these facts would convert every retail theft into a burglary, rendering superfluous the retail theft statute. *Id.*

¶ 23 The *McDaniel* court in no way disapproved of case law holding that, given sufficient evidence, a defendant may properly be convicted of both retail theft and burglary based on the intent to commit retail theft. To have done so would obviously have been both *dictum* and contrary to the intent of the legislature as recognized by our supreme court. *McDaniel*'s refusal to rewrite the burglary statute is not inconsistent with our decision here to apply the statute as it is written and has been construed by our courts.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 25 Affirmed.